Liew Nyok Kue v Timbalan Menteri Dalam Negeri Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–86 OF 2010
AZIAH ALI J
31 JANUARY 2011

Administrative Law — Exercise of administrative powers — Restricted residence — Validity of order — Appeal against decision of Deputy Minister — Delay of ten days in issuing order — Whether inordinate delay — Contradicting averments in Deputy Minister's affidavits — Whether Deputy Minister had acted mechanically — Restricted Residence Act 1933 s 2(1) & (2)

Banishment — Arrest and detention — Restricted Residence Act 1933 — Validity of order — Appeal against decision of Deputy Minister — Delay of ten days in issuing order — Whether inordinate delay — Contradicting averments in Deputy Minister's affidavits — Whether Deputy Minister acted mechanically — Restricted Residence Act 1933 s 2(1) & (2)

The plaintiff was arrested on 14 March 2010 in Ipoh under a warrant of arrest and detention issued by the first respondent, the Deputy Minister under s 2(1) of the Restricted Residence Act 1933 ('the Act') and brought to the Perak Police Contingent Headquarters. On the same day the plaintiff was taken to Taiping Prison until 24 March 2010. On 24 March 2010 the Deputy Minister issued a restriction order ('the order') under s 2(2) of the Act restricting the plaintiff in Mukim Jabi, Daerah Besut, Terengganu for two years commencing 24 March 2010. The plaintiff filed this action seeking to declare the order null and void on the ground of ordinate delay of ten days by the Deputy Minister in issuing the order. The Deputy Minister in his affidavit in reply gave his reasons for issuing the warrant of arrest and detention and for the delay of ten days.

Held, allowing the application:
The Deputy Minister had averred in para 5(iii) of his affidavit that in issuing the warrant of arrest and detention, he was satisfied that no inquiry was necessary. In para 12(a) he averred that he had to look at the plaintiff's file and consider the documents and relevant matters and current information on the investigation. However there was no indication what the current information was and, if there was such information, when it was obtained. In para 12(b) the Deputy Minister averred that he had to decide whether to hold an inquiry, contrary to his averment in para 5(iii) of his affidavit. There was nothing in the Deputy Minister's affidavits to show that further information was available

subsequent to the making of the warrant of arrest and detention order which may necessitate an inquiry. Hence, not only had the Deputy Minister acted mechanically but he had failed to act with convenient speed (see para 11); *Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals* [2007] 5 MLJ 611 referred; *Kho Sin Hock v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2008] 5 MLJ 281 referred.

[Bahasa Malaysia summary

Plaintif ditangkap pada 14 Mac 2010 di Ipoh di bawah waran bagi penangkapan dan penahanan yang dikeluarkan oleh responden pertama, Timbalan Menteri di bawah s 2(1) Akta Kediaman Terhad 1933 ('Akta') dan dibawa ke Ibupejabat Kontijen Polis Perak. Pada hari yang sama plaintif dibawa ke Penjara Taiping sehingga 24 Mac 2010. Pada 24 Mac 2010 Timbalan Menteri mengeluarkan perintah terhad ('perintah) di bawah s 2(2) Akta menghadkan plaintif di Mukim Jabi, Daerah Besut, Terengganu selama dua tahun bermula dari 24 Mac 2010. Plaintif memfailkan tindakan ini memohon untuk perisytiharan perintah tersebut batal dan tak sah atas alasan kelewatan sepuluh hari oleh Timbalan Menteri dalam mengeluarkan perintah tersebut. Timbalan Menteri dalam afidavit jawapannya memberikan alasan-alasannya mengeluarkan waran bagi penangkapan dan penahanan dan kelewatan sepuluh hari.

Diputuskan, membenarkan permohonan:
Timbalan Menteri telah menegaskan dalam pereggan 5(iii) afidavitnya bahawa dalam mengeluarkan waran bagi penangkapan dan penahanan, beliau berpuas hati bahawa siasatan tidak perlu. Dalam perenggan 12(a) beliau menegaskan bahawa beliau terpaksa melihat fail plaintif dan menimbangkan dokumen-dokumen dan perkara relevan dan maklumat semasa semasa siasatan. Walau bagaimanapun, tidak terdapat bayangan apakah yang menjadi maklumat semasa dan, jika terdapat maklumat sedemikian, bilakah ia diperolehi. Dalam perenggan 12(b) Timbalan Menteri menegaskan bahawa beliau terpaksa memutuskan sama ada untuk mengadakan siasatan, bertentangan dengan penegasan beliau di dalam perenggan 5(iii) afidavitnya. Tidak terdapat apa-apa di dalam afidavit Timbalan Menteri untuk menunjukkan bahawa terdapat maklumat selanjut selepas membuat waran bagi penangkapan dan perintah penahanan yang mana mungkin memerlukan siasatan. Maka, bukan sahaja Timbalan Menteri bertindak secara mekanikal tetapi beliau gagal untuk bertindak dengan segera (lihat perenggan 11); *Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals* [2007] 5 MLJ 611 dirujuk; *Kho Sin Hock v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2008] 5 MLJ 281 dirujuk.]

Notes

For cases on restricted residence, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 141–147.

A For cases on Restricted Residence Act 1933, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2068–2069.

Cases referred to

B *Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals* [2007] 5 MLJ 611; [2007] 5 CLJ 171, CA (refd)

Kho Sin Hock v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2008] 5 MLJ 281; [2008] 9 CLJ 701 (refd)

Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui [1991] C 1 MLJ 350; [1991] 1 CLJ 45 (Rep), SC (refd)

Su Yu Min v Ketua Polis Negeri & Ors [2005] 6 MLJ 768; [2005] 3 CLJ 875, HC (refd)

Legislation referred to

D Restricted Residence Act 1933 ss 2, 2(1), (2), 2A(1)
Restricted Residence Enactment (FMS Cap 39) s 2(i)

V Saravanan (Suresh Thanabalasingam) for the plaintiff.
Zafran Zafri bin Mohd Zaini (Federal Counsel, Attorney General's Chambers) for E *the defendants.*

Aziah Ali J:

F **[1]** The plaintiff was arrested on 14 March 2010 in Ipoh at about 3.45pm under a warrant of arrest and detention issued by the first respondent, the Deputy Minister under s 2(1) of the Restricted Residence Act 1933 ('the Act') and brought to the Perak Police Contingent Headquarters. On the same day the plaintiff was taken to Taiping prison until 24 March 2010. On 24 March G 2010 the Deputy Minister issued a restriction order ('the order') under s 2(2) of the Act restricting the plaintiff in Mukim Jabi, Daerah Besut, Terengganu for two years commencing 24 March 2010 (exh ASY2).

H **[2]** By way of this action the plaintiff seeks to declare the order null and void and of no legal effect on the ground of ordinate delay of ten days by the Deputy Minister in issuing the order.

I **[3]** The Deputy Minister gave his reasons for issuing the warrant of arrest and detention vide para 5 of his affidavit in reply (encl 7) as follows:

> 5. Saya sesungguhnya menyatakan bahawa pada 12.2.2010, saya telah mengeluarkan satu Waran Tangkap dan Tahan dan Alasan-Alasan Tangkapan di bawah Seksyen 2(1) Akta tersebut ke atas Plaintif yang mana dilampirkan dan

ditandakan sebagai eksibit 'ASY-1' di dalam Afidavit saya ini setelah mengambilkira perkara berikut:-

(i) selepas meneliti dan menimbangkan maklumat-maklumat bertulis dan kes fail Plaintif;

(ii) selepas berpuashati bahawa kegiatan-kegiatan Plaintif tidak mendatangkan faedah kepada keamanan dan ketenteraman awam iaitu Plaintif adalah merupakan penganjur satu sindiket yang menjalankan kegiatan catat taruh haram (bookie haram) di Kelab Lumba Kuda PTC Ipoh, Perak sejak bulan Januari tahun 2007;

(iii) selepas berpuashati bahawa tidak perlu diadakan apa-apa inkuiri dan;

(iv) setelah berpuas hati bahawa terdapat sebab-sebab yang munasabah untuk mempercayai bahawa Plaintif patut tinggal di dalam mana-mana kawasan atau daerah tertentu.

In para 12 the Deputy Minister explained the delay of ten days in issuing the order as follows:

(a) saya harus melihat, meneliti dan menilai dokumen-dokumen dan fail kes Plaintif yang relevan di dalam perkara ini dan juga maklumat terkini mengenai fail siasatan Plaintif;

(b) saya harus memutuskan samada untuk mengadakan inkuiri atau sebaliknya;

(c) saya harus menetukan terma-terma dan syarat-syarat di dalam eksibit 'ASY-2' dalam Afidavit saya ini; dan

(d) di dalam menetukan terma-terma dan syarat-syarat, saya juga harus meneliti kesesuaian tempat sekatan dan kesesuaian Plaintif bekerja.

[4] Counsel for the plaintiff submits that the plaintiff has challenged the reasons given by the Deputy Minister for the delay of ten days in issuing the order. In para 5 of the plaintiff's affidavit in reply (encl 11) the plaintiff avers that the warrant of arrest and detention was issued on 12 February 2010. He was arrested on 14 March 2010. The order was issued on 24 March 2010. The plaintiff states that the warrant of arrest and detention and the order were issued by the same Deputy Minister. The Deputy Minister has averred vide subpara 5(iii) of his affidavit in reply that he was satisfied that no further inquiry was required. Therefore it is submitted that there is no reason for the delay in issuing the order. In support counsel cites the case of *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui* [1991] 1 MLJ 350; [1991] 1 CLJ 458 (Rep).

[5] Counsel refers to para 12(b) of the Deputy Minister's affidavit wherein the Deputy Minister avers that he has to decide whether or not to hold an inquiry. It is submitted that during the period of two months from the date of the warrant of arrest and detention and the date when the order was issued,

there is no evidence of any new information and therefore the reason given by the Deputy Minister in para 12(b) that he needed to decide whether or not to hold an inquiry is unreasonable. Therefore it is contended that the Deputy Minister has acted in a mechanical manner. It is submitted that the delay in issuing the order is not in accordance with law as the Deputy Minister is obliged to make the order with convenient speed. In para 7 of his affidavit the plaintiff refers to three other similar cases where the delay in issuing the order was 13 and 14 days and in those cases the Deputy Minister has given reasons similar to the reasons given in the present case to explain the delay.

[6] For the defendants learned federal counsel submits that s 2(2) of the Act does not specify a time frame for the issuance of the order. The Deputy Minister has explained the reason for the delay. The Deputy Minister has to be satisfied before issuing the order and the subjective satisfaction of the Deputy Minister is not subject to judicial review (*Su Yu Min v Ketua Polis Negeri & Ors* [2005] 6 MLJ 768; [2005] 3 CLJ 875). In the circumstances learned federal counsel submits that the Deputy Minster has acted reasonably.

DECISION

[7] Section 2 of the Act provides as follows:

> 2 Order for residence in particular place or exclusion from particular place or places.
>
> (i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular area or should be prohibited from entering into any particular area or areas the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison, for the detention of that person.
>
> (ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in the order, the person do reside in such area as may be specified in the order or do not enter into such area or areas as may be so specified.

[8] In *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui* there was a delay of six weeks in the making of the restriction order and similar to the present case, at the time the Deputy Minister issued the arrest and detention order under s 2(i) of the Restricted Residence Enactment Cap 39, the Deputy Minister was satisfied that it was not necessary to hold an inquiry as upon written information and documents he had reasonable grounds for believing that the plaintiff should he required to reside in another area, namely Bandaran Tapah, Daerah Batang Padang, Perak. In delivering the judgment of the Supreme Court Abdul Hamid Omar LP said:

> … it seems clear that a time frame is not prescribed under s 2(ii) of the Enactment and the Timbalan Menteri cannot therefore be said to be imposed with an obligation to make a restriction order within a specified time. The word 'thereafter' used in sub-s (ii) of the Enactment clearly connotes that the Timbalan Menteri may make a restriction order 'thereafter', that is, some time after making the order of arrest and detention, after such further enquiry he may deem necessary.
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> Two distinct situations would therefore arise where a restriction order is issued and that is:
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> (a) after a further enquiry (if further enquiry is deemed necessary); and
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> (b) after no further enquiry is deemed necessary.
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> In the light of the judgment in *Phua Hing Lei*'s case the position in law seems to be that when no time frame is prescribed then anything that shall be done under s 2(ii) shall be done with all convenient speed. Accordingly in respect of situation (1), the further enquiry and the issue of the restriction order shall be effected with all convenient speed. What constitutes convenient speed would depend on the circumstances of each case. In respect of situation (2), where the Timbalan Menteri does not deem it necessary for any further enquiry he ought to proceed thereafter, that is, after the detention, to make the restriction order with all convenient speed.

His Lordship said further:

> The question that was before him was whether the Timbalan Menteri in the particular circumstances of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide an explanation acceptable to the court.
>
> The Timbalan Menteri had made a firm decision that it was not necessary to hold any further enquiry under s 2(ii) of the Enactment. All he did was to scrutinise the information and documents, presumably in respect of those he already had in his possession at the time he issued the order for the plaintiff's arrest and detention. There was thus nothing to show that the Timbalan Menteri had to scrutinise new information or documents other than those he had already scrutinised before making the order under s 2(ii). There was also nothing to show that he caused further statements to be recorded or further documents to be taken possession of after the order under s 2(i). Why therefore did he have to wait six weeks to make the restriction order?

[9] In *Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals* [2007] 5 MLJ 611; [2007] 5 CLJ 171 the Court of Appeal said that the applicable approach to be adopted is firstly, the appropriate test is not on the delay in carrying out the legal obligation but rather on whether the legal obligation was carried out with all convenient speed under the circumstances of the case. In other words, it is whether the Minister or Deputy Minister has acted reasonably. And, secondly, the burden of

establishing the performance of the legal obligation under such circumstances remained on the applicant, the restricted person and never shifted to the respondent.

[10] In *Kho Sin Hock v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2008] 5 MLJ 281; [2008] 9 CLJ 701 the factual situation is similar to the present case. In that case the Deputy Minister stated that no further enquiry was necessary. The Deputy Minister gave five reasons to explain the delay of 17 days (which are similar to the reasons found in para 12 of the Deputy Minister's affidavit in the present case) as follows:

(a) Saya harus melihat, meneliti dan menilai dokumen-dokumen dan fail kes plaintif yang relevan di dalam perkara ini dan juga maklumat terkini mengenai fail siasatan plaintif;

(b) Saya harus memutuskan samada untuk mengadakan inkuiri atau sebaliknya;

(c) Saya harus menimbangkan rayuan jika ada yang akan dikemukakan oleh plaintif;

(d) Saya harus menentukan terma-terma dan syarat-syarat di dalam eks. 'MJB2' sebagaimana yang dilampir dan ditandakan dalam afidavit saya ini; dan

(e) Di dalam menentukan terma-terma dan syarat-syarat, saya juga harus meneiiti kesesuaian tempat sekatan dan kesesuaian pemohon bekerja.

The learned judicial commissioner found that explanation (a) is devoid of merit and is unsustainable. The learned judicial commissioner agreed with counsel that since the Deputy Minister had already decided that no further enquiry was necessary therefore the Deputy Minister ought to have proceeded to make the restriction order with all convenient speed. There was no reason for the Deputy Minister to wait for 17 days before making the restriction order in the light of the Deputy Minister's assertions that no further enquiry was necessary. The learned judicial commissioner found that the explanation that the Deputy Minister still needed to consider whether to hold an enquiry or not is feeble and misconceived. Therefore the learned judicial commissioner found that the making of the orders under s 2(2) and s 2A(1) were not carried out by the Deputy Minister with all convenient speed.

[11] Likewise in the present case the Deputy Minister has averred in para 5(iii) that in issuing the warrant of arrest and detention, he was satisfied that no inquiry was necessary. In para 12(a) he avers that he has to look at the plaintiff's file and consider the documents and relevant matters and current information on the investigation. However there is no indication what the current information is and, if there was such information, when it was obtained. In para 12(b) the Deputy Minister avers that he has to decide whether to hold an inquiry, contrary to his averment in para 5(iii) of his affidavit. I find nothing in the Deputy Minister's affidavits to show that further

information was available subsequent to the making of the warrant of arrest and detention order which may necessitate an inquiry. In the circumstances I agree with counsel for the plaintiff that not only has the Deputy Minister acted mechanically but he has failed to act with convenient speed. The application is allowed in terms of prayer (1). No order as to costs.

Application allowed.

Reported by Kanesh Sundrum